

## Law and Authority

### *“An unjust law is not a law”*

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The statement ‘an unjust law is not a law’ is often treated as a summary of how natural law theorists approach the question of whether a law is valid or not. While modern natural law theorists deny that it is the heart of their system, it does highlight the main difference between them and legal positivists. For the natural lawyer, determining whether a law is valid or not will involve engaging in moral reasoning to determine whether the law is just or unjust. For the positivist, whether a law is valid or not is a social question that is distinct from the merits of the law. However, the two positions are not contradictory because positivists and natural lawyers are asking different questions and therefore using the concepts of law and legal validity in different senses. Whereas the positivist is concerned primarily with determining how a court will decide a particular legal question, the natural lawyer is concerned with the broader questions of where law gets its authority from and whether or not individuals should obey it.

#### **Different senses of the word ‘law’**

The statement ‘an unjust law is not a law’ presupposes a distinction between two different senses of law, between the positive law understood with reference only to the society and institutions that created it, and the positive law understood with reference to the natural law. To use the language of Finnis, the former is law in the secondary sense, the latter law in the focal sense.<sup>1</sup> Hart’s critique at this point misses the mark. If the proponents of the maxim ‘an unjust law is not a law’ have only the positive law in mind, as Hart seems to suggest, then the statement is self-contradictory. It is like saying ‘a gum tree is not a tree’, or as Hart says, ‘a statute is not a law’.<sup>2</sup> But that is not what they are saying. Natural law theorists can affirm that the validity of a positive law may in the secondary sense be independent of any considerations of the natural law, while at the same time affirming what the legal positivist

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<sup>1</sup> John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011), 364-6.

<sup>2</sup> H. L. A. Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012), 8.

denies, namely that in the primarily, focal sense, the validity of law depends on it being consistent with right reason.<sup>3</sup>

This distinction might not always be obvious in popular discourse about the natural law, but it is fair to say that it is usually assumed. In his famous *Letter from a Birmingham Jail* Martin Luther King Junior carelessly paraphrases the maxim as ‘an unjust law is no law at all’, but he was not denying that there were laws discriminating against African-Americans in the United States. Rather, he was saying that these unjust laws *lacked moral force* and that he was therefore justified in breaking them. In the focal sense an unjust law is a perversion of law (as Aquinas said) because its effect is contrary to the proper purpose of law, which is to help people to act in accordance with right reason.<sup>4</sup> Such a law is defective even if it is a valid law in the secondary sense of the word, having the full support of the legal institutions behind it.

### **The Positivists’ critique**

According to Leslie Green, ‘legal positivism is the thesis that the existence and content of law depends on social facts and not on its merits.’<sup>5</sup> Law is a purely social phenomenon that does not need to appeal to morality for its validity. Hence Hart denies that ‘the criteria of legal validity of particular laws used in a legal system must include, tacitly if not explicitly, a reference to morality or justice.’<sup>6</sup> By drawing a firm distinction between law and morality, Hart believes he is in a better position than the natural lawyer to assess the merits of the law.<sup>7</sup> For example he points out, correctly, that not all evil laws lack a valid purpose.<sup>8</sup> Often an evil law will be better than no law at all. A law that allowed a person to own a slave on the condition that they feed them well would be unjust, but it would be better than having no law and the slave master being able to work their slave to death. This complex interplay between law and morality, Hart believes, is muddled by the natural lawyer who is concerned with determining the validity of the law by reference to its ethical merits.

It is at this point that the maxim ‘an unjust law is not a law’ can become unhelpful. At what point exactly does a law become sufficiently unjust that it is no longer a valid law in the focal

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<sup>3</sup> John Finnis, ‘Natural Law Theories’ (2011) *Stanford Encyclopedia of Philosophy* <<http://stanford.library.usyd.edu.au/entries/natural-law-theories/>>.

<sup>4</sup> Aquinas, *Summa Theologica*, I-II, Q. 95 A. 2; I-II, Q. 90, A. 2 & 4.

<sup>5</sup> Leslie Green, ‘Legal Positivism’ (2003) *Stanford Encyclopedia of Philosophy* <<http://stanford.library.usyd.edu.au/entries/legal-positivism/>>.

<sup>6</sup> H. L. A. Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012), 185.

<sup>7</sup> *Ibid*, 211.

<sup>8</sup> *Ibid*.

sense? Indeed, if we take the Thomistic summary of law as our starting point the problem becomes even greater:

“the definition of law may be [said to be] nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated.”<sup>9</sup>

Thomas seems to be saying not only must a law be a law as the positivist understands it, but it must also be rational, and for the good of the community. So not only blatantly unjust laws are not laws in the focal sense, but a law that is irrational, or enacted for corrupt ends, also fails Aquinas’ definition of law. Aquinas follows this definition for a reason. He is not concerned primarily, as the legal positivist is, with determining what a court will decide in a particular case. He is concerned with the more fundamental questions of why law exists and whether it has the authority it claims.

### **Legal validity and the moral obligation to obey the law**

It is worth reiterating that the natural law theorist need not deny what the legal positivist asserts about the law, but they do believe that there is more to be said about the law than the legal positivist would accept. When a legal positivist states that a legal rule is invalid, he is saying that it is not recognised as a legal rule according to the rule of recognition, and will not be enforced by the courts. When a natural law theorist states that a law (in the focal sense) is invalid, she is saying that it lacks the moral force it would otherwise have had. Clearly they are talking about different things.

There is no uniform agreement between positivists about the relationship between law and the moral obligation to obey it, and important as the question may be, it is treated quite separately from the question of what law is. On the other hand, natural law theorists treat questions of legal validity and the moral obligation to obey the law as being closely connected.<sup>10</sup> And in doing so, they are taking into account one of the primary features of law: its claim to be binding on all people coming under its jurisdiction. The law claims both the authority to grant rights and impose obligations on all members of society, and the right to empower legal officials with authority to enforce those rights and obligations; powers that no private individual or voluntary association could with reason claim for themselves.<sup>11</sup> This is

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<sup>9</sup> Aquinas, *Summa Theologica*, Q. 90, A. 4.

<sup>10</sup> John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011), 359-60.

<sup>11</sup> Philip Soper, 'Law's Normative Claims' in Robert P George (ed) *The Autonomy of Law: Essays on Legal Positivism* (Oxford University Press, 1996), 219-220.

perhaps clearest in the realm of criminal law, though it is true of all law. If a court sentences a thief to jail it is seen as just (moral), but if a private individual or group were to ‘take the law into their own hands’ and lock the thief up themselves it would be seen as immoral. It is evident that society believes the law has a moral authority that ordinarily individuals and other institutions lack. Otherwise, the coercive nature of the law would be tyranny.

The natural law theorist looks at the claims of the law to possess moral authority and grants that they are *prima facie* valid. That does not mean that the law has automatic moral authority simply because it is the law – ‘rulers have, very strictly speaking, no right to be obeyed.’<sup>12</sup> Indeed it is a central concern of natural law theory to explain why the law has (or doesn’t have) the authority it claims. Nor does it mean that all valid laws have the same moral value. The law against murder carries more force than the law requiring a person to honour their contract or face paying damages. Even unjust laws may carry some moral authority, as Finnis points out, if they are better for the community than the alternatives, or if disobeying them would undermine the rest of the law, which is largely just.<sup>13</sup> (This suggests that the maxim ‘an unjust law is not law’ needs to be qualified even when law is understood in the focal sense). What it does mean is that the law as an institution exists for a purpose, and its end is essentially moral: to facilitate the achievement of a good and just society.

### **The authority of the law**

While formerly it was widely assumed that there was a *prima facie* obligation to obey the law, this assumption is now widely criticised.<sup>14</sup> For Raz, the question of the moral obligation to obey the law is distinct from its claim to authority. Under his theory, a moral obligation to obey a particular law arises for an individual only when it helps them better comply with right reason. Hence the law as an institution does not of itself possess moral authority.<sup>15</sup> However, according to Raz the law nonetheless *necessarily* claims such moral authority, even though it does not have it. This is so because the law demands that it be obeyed by everyone, regardless of whether or not the particular law in question advances the cause of right reason for the particular individual concerned. But this means that the law necessarily makes a claim that is not true, or at least not universally true.

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<sup>12</sup> John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011).

<sup>13</sup> *Ibid*, 361.

<sup>14</sup> See, for example, M. B. E. Smith, 'Is There a Prima Facie Obligation to Obey the Law?' (1973) 82 *Yale Law Journal* 950.

<sup>15</sup> Joseph Raz, *Ethics in the Public Domain* (Oxford University Press, 1994), 215-6, 346-8.

This disjunction between the claims the law makes about its moral authority and what it actually possesses is problematic. A law can of course lose its moral authority if it is sufficiently unjust. The problem is that, for Raz, a particular law only gains its moral authority once it is decided that the law is in a better position than the individual to determine the right course of action in a particular scenario. However, the coercive nature of law is justified by reference to its general moral authority and not to the particular virtue of individual laws.<sup>16</sup> Since Raz doesn't believe the law's claim to possess moral authority is actually true, it is difficult to see how the coercive nature of the law can be justified. We avoid this problem if we start with the traditional presumption that the positive law generally does advance the common good, and therefore it generally has moral authority, and that it is therefore generally acceptable for it to be coercive. Only when it has overstepped the limits of its authority does the law cease to have moral authority, and at that point it loses its moral right to be coercive. The law is at this point, in the focal sense, no longer law but a perversion of law.

### **Grounding the positive law in the natural law: testing legal validity by the law's goal**

Hart is correct to identify the natural law understanding of law as a teleological conception of law.<sup>17</sup> Law is not, for the natural lawyer, just a 'sheer social fact'.<sup>18</sup> Legal institutions exist to facilitate the achievement of a good and just society, and the moral authority of the laws they administer depends on their ability to advance society towards that goal. What constitutes a good society is determined by reference to the natural law. There are certain basic goods that have intrinsic value (such as friendship and knowledge) and are worth pursuing as ends of themselves.<sup>19</sup> The purpose of the law is to provide the framework within which individuals interact with each other, and thereby help people achieve the basic goods of practical reasonableness. While it must be firmly denied that the positive law is just a codification of the natural law (there is nothing in the natural law that requires the GST rate to be 10%), it does mean that the principles underlying the positive law, such as the principle of fairness, are derived from the natural law.<sup>20</sup> Inasmuch as the positive law transgresses those principles and thwarts the achievement of a just society, the law has exceeded the scope of its authority

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<sup>16</sup> *Contra* Raz, the law is not like a knowledgeable friend because it is coercive, not advisory. See *ibid*, 348.

<sup>17</sup> H. L. A. Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012), 189-91.

<sup>18</sup> John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011), 359.

<sup>19</sup> *Ibid*, 23.

<sup>20</sup> *Ibid*, 285.

and is invalid. To put it in terms that any lawyer would understand, a law that is *ultra vires* is not a law.

That does not mean that judicial officers in a basically just and democratic society, when interpreting the positive law, have to engage in moral reasoning before determining whether to apply the law or not. They could do so, but that is not required by the natural law. Natural lawyers can be as firm as legal positivists in requiring judges to test the law only by reference to the rule of recognition. Indeed, it can be argued that a judge in a democratic society should not invalidate a law that they believe is unjust because by doing so they would undermine the rule of law. The question of whether a law is valid in the focal sense should always be asked by the legal officials creating the law, and it should be asked by citizens who are determining whether they should obey the law or not, but it is not necessarily the role of unelected judges to invalidate laws they believe to be unjust.<sup>21</sup>

## **Conclusion**

The statement ‘an unjust law is not a law’ usefully indicates that the authority of the law is dependent on its purpose to advance the common good, and that when it thwarts that goal it ceases to be good law in the focal sense. It should not be taken as the final word of natural law theorists on the nature of law, as some positivists seem to suggest. Legal validity in the positive sense should not be confused with legal validity in the focal sense. It is reductionist of the positivists to assert that legal validity can only be spoken of in the former sense and not the latter. Natural law theorists can account for the claims of the law to possess moral authority because they recognise that morality and legal validity are intertwined. In recognising that the validity of a law depends upon it satisfying certain moral standards, they acknowledge that the legitimate authority of the law is limited. Only when the law accords with right reason is it entitled to make demands upon individuals’ consciences.

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<sup>21</sup> Robert P George, 'Natural Law and Positive Law' in Robert P George (ed) *The Autonomy of Law: Essays on Legal Positivism* (Oxford University Press, 1996).

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